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ABSTRACT

The Brown decision of 1954 was the product of a planned program of litigation begun in the late 1920s and the early 1930s by a group of Black lawyers. Their work would not have succeeded if the ethos of the United States had not been changing simultaneously. The growth of a climate more conducive to civil rights is reflected in the presidential administrations of Truman through Carter. The 1947 "Truman Committee Report" called for changes in American life and law, with regard for race relations, and under Truman, the national government supported civil rights lawyers in some of their most important litigation. Although Eisenhower was reportedly appalled by the Brown decision, he did nothing to hinder the implementation of the decision and sent military forces to Little Rock, Arkansas, when the first armed insurrection against Brown arose. Kennedy supported Brown both publicly and privately, and Johnson was a vigorous proponent of civil rights, who fought effectively for the Civil Rights Acts of 1964 and 1965 and created bureaucracies which have been necessary for executing national civil rights programs. Nixon openly opposed school integration. Still, he implemented the laws and more school desegregation took place during his administration than in any other. President Carter appointed more Blacks and women as judges than ever before in American history, and began a policy of international human rights. The Reagan administration, in sharp contrast, opposed school integration and tried to grant tax exemption to segregating academies. It is not yet clear whether these actions represent a temporary or permanent movement within the national attitude toward civil rights. (KH)

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CIVIL RIGHTS LAW AND THE BROWN DECISION

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Thank you ladies and gentlemen. This past weekend I spent some time with a friend from England who told me a story that has some, at least to me, some relevance to the proceedings that have been going on this week. He told me that during World War II he had an Italian friend who was in exile from Mussolini living in England and who whiled away the time trying to learn English by listening to the radio. And one day he came to my friend in great excitement and said that he had heard a speech of Franklin D. Roosevelt, on the radio, advocating what later became known as the famous four freedoms and he was very, he was, he was excited. He was very happy to hear that in the new world, after the war would be won by the allied powers, we would have those four freedoms and my friend asked him what they were. He said, "Well, preeminent among them were freedom from thought and freedom from speech." I hope that by the time my speech is over you are not craving freedom from speech.

I'm talking to you tonight about Brown Against Board of Education and Civil Rights and I thought that a subtitle to this talk might be Presidents or Administrations I Have Known, because as I look back, I am astonished to be able to count that I have been practicing law through the administrations of Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, and now, Reagan. I'm going to try to talk to you a bit about what civil rights meant and where civil rights went during the administrations of most of those presidents.

Brown v. Board of Education just didn't happen spontaneously. It came out of an effort that began in the late 1920's and the early 1930's. It was

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the product, the intellectual product, of a group of brilliant Black lawyers with whom I was fortunate to be associated, commencing in the late 1940's. They had begun a planned program of litigation, building case upon case, with the hope of achieving precedence that ultimately would lead to the demise of the doctrine of separate but equal which had been proclaimed by the Supreme Court of the United States in 1896. And they did that and I won't recount to you the cases that they brought, but they first brought the cases that outlawed segregation in graduate and professional schools and out of those precedents emerged the Brown Decision.

But the Brown Decision didn't happen all by itself. No group of lawyers as brilliant, well equipped, well put together as they might be, could change the ethos of the morality of the legal principles of a country all by themselves. Legal decisions don't happen in vacuums and just as Holmes once wrote, "Life of the law has not been logic; it has been experience." The country was experiencing things which contributed greatly to the emergence of Brown and what Brown really did was to capture that moment and formulate it in a way so that it could be proclaimed by the law.

And what was going on in the country at that time was a sense of morality that came out of the experience of World War II which, after all, was a war against Nazi racism, first and foremost. The country had experienced demographic changes in which the Black population no longer was concentrated in, almost wholly, living in the southern part of the United States, but became a truly national population. Black people had contributed to the war effort through World War II and, indeed, earlier in World War I and had shed their blood for the country in a way that created a debt which there could be no feeling other than it had to be repaid. There was a prosperity growing out of wartime experience which was not irrelevant to this process because I think

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people can live out and express their better instincts when they're hard-pressed than if they were living as extremists. And the rest of the world, which was looking to the United States, certainly, appropriately could point the finger at the United States saying, "Here you are preaching democracy to us (particularly those parts of the world which were still under British and other imperial rule) and you're performing a species of internal colonialism yourself."

Now, all of these factors were expressed in a sense of national purpose in a famous document that has not received the attention in American history that I think it deserves and that is the 1947 report of President Truman's Committee on Civil Rights. The Truman Committee Report called for changes in American life and law, with regard to race relations, that became, that were carried out and were realized, almost to the letter over the next twenty-one years. When finally the Civil Rights Act of 1968 was passed abolishing, in law at least, segregation and discrimination in housing, every single one of the prescriptions in the 1947 act had been achieved, in law I have to emphasize. It called for an end of discrimination of the District of Columbia which was a separate national disgrace. Here was the nation's capital which was racially segregated and then to discrimination in housing, education, employment, voting, and then reflecting the sense of the issue of colonialism that existed at that time--something we don't even think about. Most of you probably don't even know, it called for liberation of the Phillipines, which was an American colony back in that time.

In addition to the Truman Committee Report, the national government, under President Truman, weighed in on the side of civil rights lawyers in some of their most important litigation and the Solicitor General, who is the lawyer that represents the United States and the Supreme Court, filed briefs on behalf

of Black civil rights lawyers and against racial segregation in a number of cases. And I might say this was not only true in the Truman administration, but the Solicitor General in the Eisenhower administration also filed briefs in the Supreme Court of the United States calling for an end to racial segregation. Eisenhower's justice department did the right thing, out of a sense of professionalism and out of where the government felt this country ought to go, though I think we all must recognize that when the moment of truth arrived and President Eisenhower saw the Brown Decision in 1954 as written by Earl Warren, his appointee, he was appalled. He had not really anticipated that something like this might happen and it is said that he never spoke to Earl Warren again after that. Nevertheless, he did nothing to get in the way of the implementation of the decision. And, indeed, when the first armed insurrection against the Brown Decision was raised in Little Rock in the late 1950's, President Eisenhower did what any president would have to do in order to prevent what really amounted to an armed rebellion against the United States. He sent the 101st Airborne to Little Rock to demonstrate that fact that the constitution speaks to all states and there is no separate state law so far as civil rights is concerned, at least since the 13th, 14th, and 15th amendments were passed--were adopted.

Moving from Eisenhower to Kennedy, the shift in national sentiment, its evolution, was manifest in the fact that, unlike Eisenhower who was silent on the Brown Decision, not attacking it publicly though disparaging it privately, President Kennedy supported the Brown Decision. He said he thought that Brown was correct and this then aligned the Supreme Court of the United States, along with the presidency, in support of the principle of racial equality. Though the Congress at that time was still in the iron grip of the south, the right wing of the Democratic party or of the Republican party, adament in its support, in its

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effort to continue the regime of racial segregation through its control of senority, the chairmanship of various Senate and House committees, and through long senority because of the one-party system in the south.

Nevertheless, Kennedy spoke up for Brown and so we had the Supreme Court and the presidency on the side of civil rights. But President Kennedy was hard-pressed, when in early 1960, almost immediately after he became president, the great civil rights demonstrations--the great civil rights movements of the sixties commenced. There were the sit-ins, the freedom rides, the marches of Dr. Martin Luther King and other leaders. There was the litigation that some of us were involved in, the Meredith Case; later on the effort to integrate other southern colleges which by law should have been integrated many years earlier but still had been recalcitrant. And President Kennedy, while endorsing these efforts in principle, tried to discourage them and slow them down for fear that they would cause all kinds of political problems for him with southern politicians whose support he needed for other things that he wanted. He tried to talk the freedom riders and the demonstrators into not freedom riding and not demonstrating. He tried to talk Dr. King into slowing down his efforts. He tried to talk the lawyers for James Meredith into holding up his effort to register in the University of Mississippi. But when none of these efforts succeeded and he was put to the test of whether to support or to oppose those efforts, he supported those efforts. Then John F. Kennedy, as we know, was killed and was succeeded by Lyndon B. Johnson.

Lyndon Johnson was a vigorous proponent of civil rights. Whatever one may think of his performance during the Vietnam war, he was a civil rights activist so far when it came to the rights of American Black people. He fought and pushed for the passage of the Civil Rights Act of 1964 and 1965. Riding to some extent on a momentum created by guilt over the assassination of John F.

Kennedy, he was able to get those enacted into law. And not only did he help bring those acts, those bills into fruition and have them enacted into law, but he began the creation of the great bureaucracies which we sometimes disparage but which nevertheless are necessary for the execution of any great national program whatever it may be, be it Social Security, the National Labor Relations Act, various other types of environmental or other types of efforts. And so the Equal Employment Commission developed, the Office of Federal Contracts Compliance expanded, the Office of Civil Rights and the Department of HEW--all of these grew, as the only way that government has ever been able to affect national conduct on a wide scale throughout the many thousands or hundreds of thousands of individuals and institutions that have to be changed over a long period of time. At this point we had standing shoulder to shoulder the Supreme Court in favor of civil rights, the president and then the Congress with passage of these laws.

When Richard Nixon was elected president of the United States, he came to that office as no professed friend of civil rights. He was opposed to the integration of schools and attempted to get the Department of Health, Education and Welfare to hold back on implementing requirements of the law that mandated that it proceed to integrate schools. His Solicitor General opposed the integration of schools in the case that was mentioned earlier, Alexander Against Holmes County Board of Education in the United States Supreme Court. But to Richard Nixon's credit, he was not an idealogue on these issues and when he lost the Holmes case, he then proceeded to implement the law in the way the Supreme Court called for. And it is a fact that more schools were integrated, more school integration took place during the presidency of Nixon than of any other president that we've had.

Nixon, also, began the affirmative action plans known as the Philadelphia Plan with goals and timetables in employment so that Black people could not only

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in theory be entitled to jobs but in fact would have the means and the assurance of achieving them in some sort of equitable proportions.

And in the Carter administration we had a continuation of this progress that we have seen up until the point that I have described to you so far. The head of the Civil Rights Division was Drew Days, a lawyer appointed from the office of the NAACP Legal Defense Fund, who administered that office with a fair and even hand but also went to, energetically saw to it, that civil rights was achieved in a variety of different ways and places. President Carter appointed more Blacks and women as judges than, several times over, than had ever been appointed before in American history. He began a policy of international human rights, proclaiming and making an effort to proclaim and implement American ideals to the rest of the world, in a way that not only had a salutary effect overseas, but that had a reflexive effect here in the United States. If now we were urging civil rights and human rights upon Argentina and the Soviet Union and South Africa, there was a double obligation upon ourselves to make certain that we had civil and human rights here in the United States.

And then we come to the presidency of Ronald Reagan. And here, for the first time, there is a 180 degree turn in the opposite direction. There is an adament, steady, idealogical effort to turn back the clock with respect to everything that is at issue. It is true that the persons who administer the, what would have to be called, the civil rights policies of this administration, because there's no other term for them, say that they are for the principles of Brown, and they are for the principle of the Civil Rights Act of 1964 and 1965. I have not checked the record of all of those individuals back against those earlier dates but I would warrant to say that a very large proportion, if not virtually all of them, were at the time that those decisions were up, that is the Brown Decision and the 1964 Civil Rights Acts were at issue, were not supporting them and indeed some of them were adamently opposed.

If we look at the record of this administration with regard to civil rights, I will just pick off some of the cases. There is the Seattle School Case, in which the city of Seattle, as a matter of local initiative, decided that it wanted to integrate its schools and so it began an indigenous, local, voluntary system of school integration with bussing that it chose to emply by itself. No federal court imposed it on them. The case got into litigation and the Reagan administration went to the Supreme Court of the United States urging that Seattle could not have its own self-selected, voluntarily selected school integration. The Supreme Court ruled against the administration.

The Voting Rights Act of 1982 was up for passage or consideration by the Congress. The Voting Rights Acts from time to time have to be renewed. They are not permanent legislation. The administration did not support the Voting Rights Acts. When finally it became apparent that the act was going to pass anyway, it supported by dragging its feet. It opposed the provisions of the act which were viewed as necessary to make it effective, and then finally when the act was adopted by almost unanimous votes in the Congress and in the Senate, the president then signed the bill into law.

Everyone here, even those who don't follow civil rights, has heard about the Bob Jones Case. Indeed, in the Nixon administration, one of the things I neglected to mention was that the Internal Revenue Service, as part of the national policy, decided that it would not grant tax exemption to institutions which segregate on the basis of race. One would think that's a matter of common sense. It doesn't really take a sophisticated legal opinion to understand the rationale behind that. Tax exemption is supposed to go to a charity. A charity is supposed to be something that helps the community at large. It certainly is not supposed to be engaged in doing any positive harm, and an institution which segregates on the basis of race ought not to be entitled to tax exemption. That had been the law.

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The Reagan administration granted tax exemption to segregating academies. When asked why this was done, the response was that, not only is it the law, but no reasonable person could figure out any way to read to law other than the way the administration had read it, except the Supreme Court of the United States which ruled against the administration 8 to 1, because, in a case in which the Department of Justice would not argue for the validity of the laws it had bent, the Supreme Court had to appoint a "friend of the court" to argue the case against tax exemption for segregated academies.

In a variety of school segregation cases the administration has come out against school integration in a great number of different forms and I'm not aware of any case in which it has come out for school integration except a case in Bakersfield, California the other day in which it claims it has come out for school integration--a claim which I don't think would stand scrutiny. In Nashville, Tennessee there was a plan that was in effect for many, many years that the school board wanted to renege on. It went to the Supreme Court of the United States. The administration backed the school board. The Supreme Court refused to hear the case.

In Baton Rouge, Louisiana there had been a school integration plan in effect for years. The administration, with the school board, went and obtained an expert from Boston to come down and explain to Baton Rouge why the plan involving bussing was really not satisfactory. The Baton Rouge school board, pulling a kind of twist that I had not really anticipated, expressed the view that they were not going to take advice on how to integrate their schools from somebody who had come from Boston because Boston was a place which really had not demonstrated that it could do that sort of thing very well, and decided it would keep the integration that it had had all along.

In Charleston, South Carolina there is a school segregation case in which the administration has sued the school board and we suspected that the case might end up in a settlement of some sort of a sweetheart contract and so our office intervened in the case, in response to which the Deputy Attorney General in Charge of, Assistant Attorney General in Charge of Civil Rights said to his staff, who then promptly went and reported it to the newspapers, so how would we know what he said, he said, "Keep the bastards out. Make them jump through every hoop." The judge, however, let whatever we might be into the case, and the case is now proceeding in a posture in which it's not possible to decide it without regard to the interests and the wishes of a Black community there.

Only two days ago in Denver, Colorado, the administration filed a pleading in an effort to undo a school integration decree that's been in effect since 1970. And so that's the record so far as school integration is concerned--adament, persistent, unrelenting and with no indications of pointing in the other direction.

So far as employment is concerned, in one case after another they have intervened in an effort to upset affirmative action. Last year, in a case involving Boston firefighters, where the court had ordered, in fact they've been a consent decree, requiring affirmative action, some percentage of Blacks to be hired alongside a fixed percentage of Whites. In view of the fact that long persisting earlier discrimination, the Supreme Court refused to hear the case because it was moot.

In a case in Detroit, the case had gone on many, many years. The city of Detroit had voluntarily adopted an affirmative action plan. The administration attempted to intervene in the case. The court refused to permit them to intervene. They then filed, "a friend of the court," brief urging that the Supreme Court hear it and upset the affirmative action plan. The Supreme Court refused to do that.

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In another case in New Orleans involving affirmative action for the police department, they've intervened in that. The result, the case is still pending. And in a case in Memphis which was argued in the Supreme Court of the United States a couple of months ago, they've attempted to overturn that affirmative action plan.

Not only do we see this sort of activity with regard to schools and employment, and I told you about the Voting Rights Act, but actually the Department of Justice has an administrative function with regard to voting. It's supposed to pass upon new schemes of voting to make certain that they don't result in racial discrimination against minorities.

In New Orleans they approved a voting rights plan which a three-judge court threw out. In North Carolina they approved a state-wide redistricting which a three-judge court has also just thrown out. And it's hard to say what is the most egregious thing that was done, but to me seems a contender for the prize, is the firing of three members of the Civil Rights Commission when the Civil Rights Commission was bringing the bad news to America, that the administration's policies were opposed to civil rights. This was enjoined by a federal district court. The commission then expired of its own natural life. A political deal was struck in which a new commission was supposed to be appointed. It was worked out that there would be four supporters of the administration and four supporters, four persons opposing the administration, on the commission as part of a political compromise and then the administration double-crossed those who'd entered into the deal and appointed six opposed and two in favor of civil rights.

So there has been until now, in any event, until the last three years, a steady, though uneven halting curve of progress, in support of civil rights.

There've been problems, there've been disappointments, there have been areas that have not been touched or have been touched inadequately, particularly with regard to the economy and that multitude of factors that are so ineffable and difficult to deal with through government, the breakdown of many Black families.

I don't think that the history up until now necessarily entitles us to have the belief that there will always be progress. I think whether one is a pessimist or an optimist depends not merely upon an assessment of historical circumstances but upon one's own temperament and outlook on life and so I tend to think that there is, it is likely that there will be or can be progress, but it isn't necessarily so. The last three years, however, have caused me great concern, and for the first time in my life, to doubt that we have been progressing until 1980.

Nevertheless, in the efforts to set back civil rights, which this administration has engaged in, as I have recounted to you, they have almost always lost. Now they have almost always lost because the ethos of America has been instilled in our law and our law has been expounded by our courts. We face the prospect, however, that over the next four years the composition and the personnel of those courts will change drastically and that of the Supreme Court of the United States will almost certainly change very, very markedly. And if that may be true, then I think we are in for a long, grim, cold period in civil rights which will last for perhaps a generation.

So the next election, more than any reading of a particular rule of law as it stands today, will tell more than anything else where this country's going to go with regard to race relations--not merely the next election with regard to the presidency, but with regard to all manifestations in the political process--the Congress and the Senate and state and local elections. But I think we are at a

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point, a critical point, in which matters can either continue moving ahead with the slight impedence we've had until now or slow down and come to a standstill and perhaps even go backwards. As for me, I like to think of it, I hope the last several years, perhaps as an analogy with what's been happening with our space missions. Ever since there have been space missions they have all gone perfectly. Everything has been roses. Nothing that I can think of seriously has gone wrong in space--except this last trip. We lost two satellites and a balloon. They say they found the problem and it won't happen again, and if it doesn't happen again we will have had a long history of space missions with inconsequential loss of two satellites and a balloon and I would hope that we can look upon these past three years that we have had, after the next election, as a brief interruption in a long upward curve of equality for all Americans and particularly Black Americans in the United States, interrupted only by the loss of two satellites and a balloon.

Thank you.